

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE HEMPHILL,

Defendant-Appellant.

UNPUBLISHED

April 13, 2010

No. 287620

Washtenaw Circuit Court

LC No. 07-002291-FC

Before: DAVIS, P.J., and DONOFRIO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals of right his jury trial conviction for second-degree murder, MCL 750.317. We affirm.

Defendant first claims that the trial court abused its discretion when it denied his motion for a continuance. A trial court's ruling on a motion for continuance is reviewed for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). Defendant claims that the trial court should have granted the motion because he received the autopsy report only five days before trial, and his counsel was allegedly unable to prepare an effective cross-examination of the medical examiner as a result. We disagree. There is no doubt from the record that defendant asserted good cause and was in no way negligent, but we do not find that defendant was prejudiced. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Five months before trial, defense counsel cross-examined the medical examiner, whose testimony at trial was essentially the same, and the prosecutor received the autopsy report the same day as defendant. Defense counsel was also in possession of a summary of the medical examiner's report. We do not find in the record any indication that defendant's right to present a defense or right to effective assistance of counsel were jeopardized by the trial court's ruling, and therefore the trial court's decision to deny the motion for a continuance was not an abuse of discretion.

Defendant next claims that the trial court abused its discretion in allowing two police officers to testify about statements that the victim made at the scene of a prior assault. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion, and we review de novo preliminary questions of law. *People v Dobek*, 274 Mich App 58, 84-85; 732 NW2d 546 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The trial court

admitted the statements under MRE 803(2), the excited utterance exception to the hearsay evidence rule. The two requirements for an excited utterance are a startling event and that the resulting statement is made while under the stress or excitement caused by that event. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998), citing *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). “[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule.” *Smith*, 456 Mich at 551.

The trial court did not abuse its discretion. Following testimony by the two officers at an MRE 404(b) hearing, the trial court found (1) that the victim was still under the stress or excitement caused by defendant’s assault, and (2) that defendant was not in police custody at the time the statements were made. We agree. The record indicates that the victim was hysterical when the police arrived, and the police had to calm her down just to find out what had happened. The fact that the victim calmed down to the point that she could technically communicate does not mean that she was no longer under the stress or excitement of the situation, and the record does not reveal anything to indicate that she had, for example, performed any tasks that require careful thought. *Straight*, 430 Mich at 426 n 6. The record supports the trial court’s finding that the victim was still under the stress and excitement of the event when she gave her statements to the police, and we find that the trial court did not abuse its discretion in allowing the police officers to testify about those statements under MRE 803(2).

Defendant next argues that the trial court erred in scoring Offense Variable (OV) 5, MCL 777.35, at 15 points on the basis of statements contained within victim impact statements that were never articulated on the record. The victim impact statements themselves were also not included in the lower court record. Regardless, we find it unnecessary to reach the merits of this argument because a scoring adjustment of OV 5 from 15 to zero points will not change defendant’s sentencing guidelines range. Resentencing is not required when the correction of an erroneous score does not result in a different sentencing range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). In ruling, we nevertheless note that statements made by the victim’s sister at sentencing supported the scoring of OV 5.

Defendant also raises two issues in his Standard 4¹ brief. Defendant first claims that he was denied the effective assistance of trial counsel. Defendant alleges that his trial counsel was ineffective for failing to object to the trial court’s departure from the sentencing guidelines, for failing to object to the admission of photographic evidence, for failing to move for judgment notwithstanding the verdict, and for failing to prepare a proper defense at the MRE 404(b) hearing. As defendant failed to file a motion for a new trial and did not seek an evidentiary hearing on his claim of ineffective assistance of counsel, our review is limited to mistakes that are apparent on the lower court record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

“[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so

¹ Administrative Order No. 2004-6, Standard 4.

prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994). Effective assistance is presumed, and defendant must overcome a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; ___ NW2d ___ (2009). Assistance is not ineffective because a lawyer concedes certain points at trial. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Decisions to decline to raise objections can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant was not denied the effective assistance of trial counsel because defense counsel’s conduct did not fall below an objective standard of reasonableness. Defendant’s minimum sentence was within the sentencing guidelines range, so any objection to the sentence on the grounds advocated by defendant would have been not only meritless, but also frivolous. A motion for judgment notwithstanding the verdict would also have been meritless, as would have any objection to the admission of the limited number of photographs that were actually admitted at trial. An attorney is not ineffective for failing to make an objection or file a motion that is frivolous or meritless. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Also, there is nothing on the record that supports defendant’s claim that defense counsel’s failure to object to the introduction of the photographs was anything but sound trial strategy, and this Court will not substitute its judgment for that of counsel on matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The record is also clear that defendant was provided with a zealous and effective defense at the MRE 404(b) hearing. Defendant’s claim of ineffective assistance of trial counsel is without merit.

Defendant’s final claim on appeal is that the trial court denied him the right to a fair trial by allowing crime scene and autopsy photographs into evidence at trial, by unfairly making defendant proceed with the MRE 404(b) hearing on the day of jury selection, and by departing from the sentencing guidelines in sentencing defendant. This court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Katt*, 468 Mich at 277. When the admissibility of evidence involves a preliminary question of law, such as whether a rule of evidence precludes admission of the evidence, review is de novo. *Id.* Because defendant’s minimum sentence was within the appropriate sentencing guidelines range, there is nothing to review related to defendant’s allegation that the trial court abused its discretion in departing from the sentencing guidelines.

With respect to the photographs, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence...more probable or less probable than it would be without the evidence.” MRE 401. All relevant evidence is generally admissible, MRE 402, but it may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. All elements of an offense are at issue when a defendant enters a not guilty plea. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), modified by 450 Mich 1212 (1995). The prosecutor has the burden of proving each element of the alleged offense beyond a reasonable doubt, even when a defendant does not dispute one of the elements. *Id.* “The claim that evidence that goes to an undisputed point is inadmissible has also been rejected in criminal cases.” *Id.*

Defendant has not specifically identified any of the photographs that should have been excluded by the trial court. Rather, defendant argues that it was error in itself to admit nearly 30 photographs, and that the admission of 30 photographs served no purpose other than to inflame

the jury. This argument was not supported with any legal analysis or citation to the record, and it is without merit. Defendant also argues that the photographs were irrelevant because he did not contest that he caused the victim's death. The record indicates that all of the photographs were relevant to help prove either defendant's state of mind or the corpus delicti of the crime of murder. Because defendant pleaded not guilty, these elements of the charged crime were at issue irrespective of whether defendant conceded that he caused the victim's death. *Mills*, 450 Mich at 69. The prosecutor was required to prove those elements by presenting relevant evidence. The trial court did not abuse its discretion in allowing the prosecutor to prove the elements of the crime with relevant evidence.

Finally, as discussed, the trial court did not abuse its discretion in denying defendant's motion for a continuance of the MRE 404(b) hearing. Defendant notes that the MRE 404(b) hearing was originally scheduled one week earlier, but was postponed "for reasons beyond the Court's control." Defendant has not provided any evidence to support his reasoning that holding the MRE 404(b) hearing one week after it was originally scheduled denied his defense counsel time to prepare. Further, despite defense counsel's initial statements to the trial court that he would not participate, defense counsel did participate in the MRE 404(b) hearing and the jury selection, and he did so zealously. Defendant was not prejudiced by the trial court's denial of the motion for a continuance, and defendant's claim fails.

Affirmed.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens